2010

Steven Anderson v. Larry H. Miller Communications Corporation, Dean Pynter Chris Baum, and John Doe : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STEVEN ANDERSON,

Plaintiff/Appellant,

vs.

LARRY H. MILLER COMMUNICATIONS CORPORATION, a corporation; and DEAN PAYNTER CHRIS BAUM, and JOHN DOE, individually,

Defendants/Appellees.

APPELLANT'S REPLY BRIEF

Case No. 20100929-CA

Appeal from final order of the Utah Third District Court
Honorable L.A. Dever
Case No. 090909953

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

ARGUMENT

I. QUESTIONS OF FACT REGARDING THE AGREEMENT BETWEEN MR. PAYNTER AND MR. ANDERSON PREVENT DETERMINATION OF ITS ENFORCEABILITY AS A MATTER OF LAW

In Mr. Anderson's Opening Brief, he argued that there is a question of fact as to whether Dean Paynter had actual or apparent authority to bind the company through his representations regarding the Employment Agreement he provided Mr. Anderson in January 2008, particularly given the discussions regarding apparent authority in *Zions First Nat'l Bank v. Clark Clinic Corp.*, 762 P.2d 1090, 1094-95 (Utah 1988) and *Shattuck-Owen v. Snowbird Corporation*, 16 P. 3d 555, 560 (Utah 2000). Appellees respond to these arguments by maintaining that the Acknowledgment Agreement Mr. Anderson signed in November 2007, which stated that only Larry H. Miller can enter into an agreement with him and that any agreement must be in writing, means Mr. Paynter did not have authority to contract with him and is therefore dispositive of Mr. Anderson's breach of contract claims. Appellees' focus on the Acknowledgment Form exclusively is misplaced, given that the contract Mr. Anderson seeks to enforce is the Employment Agreement that Mr. Paynter provided him *after* he signed the Acknowledgment Form. It is this Employment Agreement that the court must examine for ambiguity, not the Acknowledgment Agreement. If the Employment Agreement is ambiguous, the

court can look to extrinsic evidence to determine the intent of the parties. *Peterson v. The Sunrider Corp.*, 48 P. 3d 918, 925 (Utah 2002). That extrinsic evidence would include the Acknowledgment Agreement, but would also include the employee handbook, which conflicts with the Acknowledgment by stating that only the General Manager, which was Chris Baum, can contract on behalf of the company. Furthermore, the extrinsic evidence would include Mr. Paynter's representations to Mr. Anderson for months that he would be guaranteed a salary for three years regardless of what happened to the show, which Mr. Anderson waited to receive in writing before he went part-time in his teaching job – which clearly indicates that Mr. Anderson intended LHMCC to be bound by the contract.

A. Dean Paynter's Actions Create a Question of Fact as to Whether he had Authority to Bind the Company

As stated above, Appellees argue that Mr. Paynter did not have actual authority to contract with him because of the language in the Acknowledgement Form that states that only Larry H. Miller himself could enter into a contract with an employee. Appellee Brief at 12. Importantly, the Employment Agreement does not specify a signator for LHMCC, but simply lists the parties as Steve Anderson and Larry H. Miller Communications Corporation (R. 137-144), so the question is whether Mr. Paynter had the authority to negotiate the agreement with Mr. Anderson, not whether he could sign on behalf of the company.

Appellees rely on several decisions from other states for their position that the court should look no further than the "four corners" of the Acknowledgment Form to determine that Mr. Paynter did not have the authority to enter into an agreement with Mr. Anderson (Appellee Brief at 12-13), but these cases are not persuasive here, given that Utah's case law regarding the scope of an "inquiry into whether an ambiguity exists in a contract" rejects "the strict application of the 'four corners' rule" espoused by some other jurisdictions. *Gillmor v. Macey*, 2005 UT App. 351, n. 14 (Utah 2005).

Appellees also suggest that the language Mr. Anderson relies upon in *Gillmor v. Macey* (*ie,* "the better-reasoned approach is to consider the writing in light of the surrounding circumstances"), has been superseded by the decisions in *Café Rio, Inc. v. Larkin-Gifford-Overton, LLC.*, 207 P.3d 1235 (Utah 2009), and *Daines v. Vincent*, 190 P.3d 1269 (Utah 2008). Appellee Brief at 13. This is incorrect. *Café Rio* and *Daines v. Vincent* pre-date the decision in *Watkins v. Ford*, in which this court used both the analyses from the *Daines* and *Gillmor* decisions, indicating they are consistent with each other. *Watkins,* 239 P. 3d 526, at 530, 532 (Utah App. 2010). *Watkins* held that in determining whether a contract is ambiguous, the court looks at whether it is facially ambiguous, as set forth in *Daines*. *Id.* at 530. Even if a contract is not facially ambiguous, however, the

court may still look for "latent ambiguities" in light of the circumstances as a whole, pursuant to *Gillmor*:

> Under Utah law, if the initial review of the plain language of a contract, within its four corners, reveals no patently obvious ambiguities, the inquiry into whether an ambiguity exists in a contract does not always end there. Utah's rules of contract interpretation allow courts to consider *any* relevant evidence to determine whether a latent ambiguity exists in contract terms that otherwise appear to be unambiguous. *Gillmor v. Macey*, 2005 UT App. 351, ¶ 35, 121 P. 3d 57. A latent ambiguity is '[a]n ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed.' *Black's Law Dictionary* 93 (9th ed.2009). Thus, if a contract, 'while on its face appearing to be certain, would open up an ambiguity when attempts were made to apply it to the subject-matter, then such ambiguity could be resolved by evidence of what meaning the parties themselves intended to invest such terms.' *Bamberger Co. v. Certified Prods., Inc.*, 88 Utah 194, 48 P.2d 489, 494 (1935); *see also Fox Film Corp. v. Ogden Theatre Co.*, 82 Utah 279, 17 P.2d 294, 296 (1932) ('One well-recognized exception to the [parol evidence] rule is that extrinsic evidence, parol or otherwise, is admissible to explain a latent ambiguity in a writing. This does not mean that terms or conditions may be inserted into or taken out of the writing by direct oral assertions, but it does mean that the court may receive evidence of such surrounding facts as will enable it to look upon the transaction through the eyes of the parties thereto and thereby know what they understood or intended the ambiguous word or provisions to mean.')

Watkins, 239 P. 3d at 532. In *Watkins,* the court found that latent ambiguities were caused by events that occurred after the contract at issue was written (the renaming of the car referenced in the contract). *Id.*

Here, the contract at issue is the Employment Agreement, which Mr. Paynter provided to Mr. Anderson in January 2008, after Mr. Anderson received the

handbook and the Acknowledgment Form. In order to determine whether the Employment Agreement is a contract, Appellees argue that the court should look no further than the language of the Acknowledgment Form, and find that Mr. Paynter did not have authority to enter into the Employee Agreement with Mr. Anderson. Appellees effectively suggest that the court take a narrow look at the circumstances of this case, an approach that is rejected in *Gillmor* and *Watkins.* Rather, Utah case law favors consideration of *all* the surrounding circumstances, which in this case includes the handbook that conflicts with the Acknowledgment Form, as well as Mr. Paynter's representations to Mr. Anderson that conflict with both the Acknowledgment Form and the handbook. These circumstances create a latent ambiguity in all the documents, which must be resolved by a fact-finder.

Mr. Anderson also argued in his Opening Brief that the Utah Supreme Court's decision in *Shattuck-Owen v. Snowbird Corporation*, 16 P. 3d 555, 560 (Utah 2000) is instructive here, because it holds that "when a representative of a company holds himself out as someone who can bind the company, even with a written statement to the contrary, there exists a material issue of fact as to whether that person has the authority to contract on behalf of the company. Opening Brief at 24. Appellees argue that *Shattuck-Owen* does not stand for this proposition. Appellee Brief at 16. Rather, Appellees argue that the decision in *Shattuck-Owen*, which found that there was a question of fact as to whether the employer's Human

Resource Director had actual or apparent authority to contract on the employer's behalf, turned on the fact that the contract disclaimer in that case "was limited, because it stated only that no one but the CEO had the authority to 'alter the at-will relationship.'" Appellee Brief at 16. This limited view of the opinion is not supported by its language. The decision did note the limited disclaimer, and stated, "the signed statement appears to have no application to the instant case." *Shattuck-Owen,* 16 P. 3d at 560. The court's analysis, however, appears to have relied at least as much on the Human Resource Director's position and the latitude the employer gave her, as deduced from the following passage:

> Moreover, the alleged facts, viewed in the light most favorable to Shattuck-Owen suggest Roberts possessed authority to contract for Snowbird. Foremost, Roberts was Snowbird's Human Resources Director—the person presumptively in charge of explaining and, when necessary, arranging for employee benefits. In addition, Snowbird management permitted Roberts to act as the company representative in attempting to address Shattuck-Owen's therapy needs. At the very least, these facts raise a genuine question as to Roberts's implied and/or apparent authority to act for Snowbird with respect to an employee benefits issue. See, e.g., *Zions First Nat'l Bank v. Clark Clinic Corp.,* 762 P. 2d 1090, 1094-95 (Utah 1988) (discussing implied and apparent authority). Because issues of material fact remain regarding Roberts' authority to contract on Snowbird's behalf, the trial court erred in granting summary judgment on that ground.

Id. Accordingly, *Shattuck-Owen's* analysis is applicable here, since Mr. Paynter was "the only one . . . that seemed to be in charge of anything," he negotiated Mr. Anderson's salary with him, and was permitted by LHMCC to act as its

representative in interfacing with Mr. Anderson about the Employment Agreement. Opening Brief at Statement of Facts, ¶¶ 3, 11, 14-18, 26-27, 29. These facts suggest that he had apparent authority to contract with Mr. Anderson.

B. The Language in the Acknowledgment Form Regarding Signed Contracts is Not Controlling Given Mr. Paynter's Subsequent Representations to Mr. Anderson that the Employment Agreement Was Enforceable Without Signatures

Appellees effectively argue that once an employee has been given a form document that states that any agreement must be in writing, this language is controlling for the remainder of the employer-employee relationship, regardless of any subsequent representations the company or its agents make, including a specific representation that a particular subsequent agreement is enforceable without signatures. Appellee Brief at 17-18. This theory has no legal support, nor does it make logical sense.

Appellees rely on *Engineering Assoc. v. Irving Place Assoc.,* 622 P.2d 784, 787 (Utah 1980), but that case is factually distinguishable, and therefore not applicable here. In *Engineering Assoc.*, the respondent sought financing through the appellants for a mortgage, in which the application for the mortgage stated, "This agreement may not be changed orally," and was contingent upon a written acceptance of the agreement and a payment of $23,000. *Engineering Assoc.*, 622 P. 2d 785-86. Because the respondent did not pay the $23,000, the court determined that it did not accept the agreement, and the agreement was not

enforceable. *Id.* at 787. Likewise, the decision in *R.J. Daum Constr. Co. v. Child*, cited by Appellees, also reviews negotiations by the parties regarding one agreement, and determines that there was no meeting of the minds that resulted in an enforceable contract. 122 Utah 194, 199-203 (1952). These cases are not persuasive here, where we are dealing with two separate documents provided to Mr. Anderson months apart, and where the initial representation that any agreement must be in writing was specifically refuted by Mr. Paynter when he presented the second agreement.

Appellees argue that the fact that LHMCC provided Mr. Anderson with the Acknowledgment Form stating that all contracts must be in writing and signed means "any such modification of the signature requirement had to be in writing and signed by all parties as well." Appellee Brief at 18. This argument fails for two reasons. First, the initial "signature requirement" was not signed by Larry Miller, and therefore, it should not be considered a binding agreement pursuant to Appellees' theory. Second, to the extent it is a binding agreement, Mr. Paynter subsequently specifically refuted it. Had Mr. Paynter not made explicit reference to the signature requirement and stated it was unnecessary, it might be reasonable to conclude that LHMCC's intent to be bound only by a signed document was still in place, but instead, Mr. Paynter directly refuted such an assertion, and in fact, physically stopped Mr. Anderson from signing the document, making clear to Mr.

Anderson that the company did not require a signature. (To the extent Mr. Paynter did this in order to entice Mr. Anderson to work for LHMCC, and to provide LHMCC with a way to avoid being bound by those promises, this supports Mr. Anderson's claim for fraud.)

Appellees have presented no case law that supports its position that a document that states that all agreements between parties must be in writing is controlling for the duration of the relationship, despite subsequent representations to the contrary. Furthermore, Mr. Anderson submits that such a rule would encourage injustices, as employers could always provide such disclaimers to employees in their initial documents as a way of avoiding liability on any subsequent promises to the unwitting employee (precisely as Appellees seek to do here).

C. The Employment Agreement is Sufficiently Definite Regarding Intent of the Parties

Appellees argue that the Employment Agreement at issue here is not enforceable because it is incomplete and indefinite. Appellee Brief at 19. Appellees made this argument before the district court in their Motion for Summary Judgment (R. 68-69), but the district court did not include them as a basis for the dismissal of Mr. Anderson's claims. Accordingly, it is not one of the rulings on appeal. To the extent this court finds that Appellee's point merits consideration as a matter of law, Mr. Anderson submits that the blanks in the

Agreement do not concern the essential terms, and therefore, the Agreement is enforceable.

Missing or uncertain terms in a contract do not necessarily render it unenforceable. "It is not necessary that the contract itself contain all the particulars of the agreement. The crucial question is whether the parties agreed on the essential terms of the contract." *C&Y Corp. v. General Biometrics, Inc.,* 896 P. 2d 47, 52 (Utah App. 1995). "Whether or not the [missing term] was essential to the contract requires an examination of the entire agreement and the circumstances under which the agreement was entered into." *Nielsen v. Gold's Gym*, 78 P. 3d 600, 602 (Utah 2003) (*citing Cessna Fin. Corp. v. Meyer*, 575 P. 2d 1048, 1050 (Utah 1978).

A contract that is ambiguous due to uncertain unessential terms may be clarified by the court based upon extrinsic evidence that demonstrates the parties' intentions. *Peterson, supra*, 48 P. 3d at 925 (Utah 2002). "Where a contract is ambiguous, summary judgment is appropriate only if the evidence, when viewed in the light most favorable to the nonmoving party, leaves no genuine issues of fact to be resolved." *Id.* at 927.

Here, the essential terms regarding salary and the three-year term of the agreement are included. According to Mr. Anderson, the essential terms of the agreement he demanded from LHMCC was that he would be guaranteed a salary

for at least three years. Mr. Paynter acknowledges being aware that Mr. Anderson was expecting a three-year contract of employment. R. 10, 184, 195. The Agreement presented here contained some blanks, but was unequivocal on the amount of his Mr. Anderson's salary and the three-year guarantee.[1] For instance, with respect to the "Term" of the Agreement, it provides that it begins November 26, 2007, that Mr. Anderson will receive a 10% raise each year, and that it ends in 2010; it then requires written notice to Mr. Anderson if LHMCC intended to continue it beyond that period, through the 2010-2011 year of the contract. R. 138. The Agreement further stated that although LHMCC could terminate Mr. Anderson's employment with or without Cause, if the Company terminated him without Cause (as defined elsewhere in the Agreement, for reasons that are inapplicable here), Mr. Anderson "shall be entitled to the average annual salary that would have been paid to Anderson over the entire remaining Term of this Agreement . . . ." R. 140-141, ¶ 10.3. [2] These are the terms that both parties agree

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[1] As for the blanks, Mr. Anderson testified that he understood that the blanks in the contract next to when his raises would go into effect were because the start date kept changing. He understood, nonetheless, that he would receive a 10% raise after he worked for one year, then another raise after the second year. R. 203-204.

[2] Notably, the Agreement also states that "The parties hereto represent and warrant to each other that they have the full right and power to enter into this Agreement. . . ," (R. 142, ¶ 14) refuting any suggestion that Mr. Paynter did not have the apparent authority to negotiate the contract with Mr. Anderson.

that Mr. Anderson was concerned with, and therefore, the essential terms are contained in the agreement. Accordingly, the Agreement is not so indefinite as to render it unenforceable as a matter of law. Any uncertainties created by the blanks are not material, and could be resolved based on the parties' intent.

II. THE ACKNOWLEDGMENT AGREEMENT DOES NOT PRECLUDE MR. ANDERSON'S PROMISSORY ESTOPPEL AND FRAUD CLAIMS

Appellees argue that Mr. Anderson's promissory estoppel claim fails for two reasons: 1) LHMCC could not be bound by Mr. Paynter's representations to Mr. Anderson; and 2) Mr. Anderson could not have reasonably relied on those representations. Appellee Brief at 20. As to the first point, Mr. Anderson submits that it is irrelevant to Mr. Anderson's promissory estoppel claim, as it does not relate to an element of the claim. *See* Appellee Brief at 21.

As to the second point, Appelles argue that Mr. Anderson's reliance upon Mr. Paynter's representations was not reasonable in light of the language in the Acknowledgment Form that stated that Larry Miller was the only person who could contract on behalf of the company and such agreement had to be in writing. Appellees rely on the decision in *Gold Standard, Inc. v. Getty Oil Co.*, 915 P. 2d 1060, 1068 (Utah 1996) ("a party cannot reasonably rely upon oral statements by the opposing party in light of contrary written information"). The language quoted in *Gold Standard* is inapplicable here, however, because in that case, the oral

statements upon which the plaintiff purported to rely came first, but were specifically refuted in several subsequent written communications that were intended to address the plaintiff's misunderstanding of the oral communication, and "indicated that the situation was not as GSI understood it to be." *Id.* at 1067-1068. In those circumstances, the court held that the plaintiff "could not reasonably rely on that [oral] promise in light of the correspondence following that meeting." *Id.* at 1067. This is quite different from Mr. Anderson's case, in which Mr. Paynter specifically refuted the stated requirement that an agreement be signed and in writing, not only by assuring Mr. Anderson that "the lawyers" said the agreement was enforceable, but also by physically restraining him from signing the agreement when he started to do so.

Appellees' sole argument against Mr. Anderson's fraud claim, both here and before the district court, rests on the same point raised against his promissory estoppel claim – that he could not have reasonably relied on Mr. Paynter's representations in light of *Gold Standard.* As stated above, *Gold Standard* is inapplicable. Moreover, there is substantial evidence that Mr. Anderson's reliance on Mr. Paynter's representations *was* reasonable, given the many times he had told Mr. Paynter that he required a three-year salary guarantee, and Mr. Paynter's repeated assurances that he would receive such a guarantee. Accordingly, Appellees have failed to meet their burden to "affirmatively provide factual

evidence establishing that there is no genuine issue of material fact," such that they are not entitled to summary judgment as a matter of law on Mr. Anderson's fraud claim. *Orvis v. Johnson*, 177 P. 3d 600, 604 (Utah 2008).

III. MR. ANDERSON'S CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING DERIVES FROM THE COVENANT IMPLICIT IN THE EMPLOYMENT AGREEMENT

Appellees argue that Mr. Anderson's claim for breach of the implied covenant of good faith and fair dealing "fails because there was no such contract [for a salary guarantee for three years] in the first place." Appellee Brief at 25. Appellees rely upon the decision in *Brehany v. Nordstrom, Inc.*, 812 P. 2d 49, 55 (Utah 1991). The *Brehany* decision is not persuasive here, however, since the court in that case relied upon the fact that the employer had made no agreement to limit its ability to terminate employees at-will, so the court could not imply such a limitation based upon an implied covenant. *Id.* at 55-56. Here, the parties do not dispute that Mr. Anderson was at-will. The terms of his employment were changed, however, by the Employment Agreement Mr. Paynter provided him, which he knew Mr. Anderson was expecting, which Mr. Anderson waited for before going part-time at his teaching job, and which Mr. Paynter told him was enforceable without signatures and stopped him from signing. This Employment Agreement, like all contracts, express or implied, carries with it an implied duty of good faith and fair dealing, pursuant to which "each party impliedly promises that

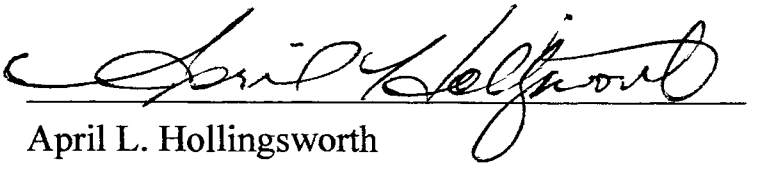
he will not intentionally or purposely do anything which will destroy or injure the other party's right to receive the fruits of the contract." *St. Benedict's Dev. v. St. Benedict's Hosp.*, 811 P. 2d 194, 199 (Utah 1991). Certainly, in light of all the facts in this case, there is a question as to whether Appellees purposely did anything to destroy Mr. Anderson's rights to the fruits of the Employment Agreement.

CONCLUSION

For the reasons set forth herein and in Mr. Anderson's Opening Brief, the district court erred in dismissing all of Mr. Anderson's claims on summary judgment. Mr. Anderson hereby requests that this Court reverse the district court's ruling on all of his claims, and remand the case for a trial on the merits.

DATED this 22nd day of August, 2011.

HOLLINGSWORTH LAW OFFICE, LLC



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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2011, two copies of the foregoing **APPELLANT'S REPLY BRIEF** was mailed first class, postage prepaid to:

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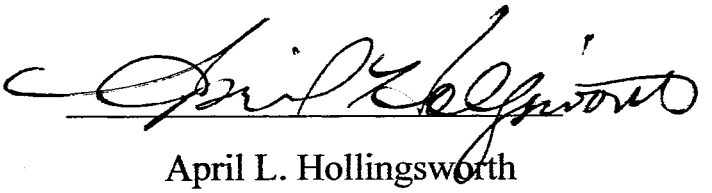

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